In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 395

EARL D. POLLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on five counts of having wilfully attempted to evade his individual income taxes for the years 1957 through 1961, in violation of 26 U.S.C. 7201. Petitioner was sentenced to concurrent prison terms of 18 months on each count and was fined $3,000 on each count, for a total fine of $15,000. The court of appeals affirmed (Pet. App. B; 394 F. 2d 922).

Petitioner was employed by the Vilter Manufacturing Co. as its export manager during the taxable years in question. Unknown to Vilter, petitioner set up a sole proprietorship under the name Manufacturers Export Co. (hereinafter referred to as MEC). Although Vilter maintained an active MEC account on its books, it was unaware of the fact that MEC was the alter ego of petitioner, Vilter's employee. Often petitioner, through MEC, advanced the funds necessary to finance the purchase of Vilter equipment by overseas distributors for their customers. When the equipment had been fabricated and was ready for shipment the services of J. E. Bernard & Co., Inc., a freight forwarder and customs house collector, were employed. Bernard would advance the cost of freight, insurance, and handling and arrange the documents necessary to get the Vilter equipment on board ship en route to the distributors. According to petitioner, the amount collected by Bernard would exceed the selling price charged by Vilter, not only by virtue of Bernard's expenses but because Bernard's price would include an element of "profit" which, according to petitioner, belonged to the distributors. After deducting its own expenses and commission, Bernard would credit the balance to the MEC account, and disburse funds from that account as directed by petitioner. The bulk of such disbursements went to Vilter for credit to the MEC account on Vilter's books. (R. 16-20, 315-317, 327-328, 331-332, 361-363, 418-420.)

The unreported income alleged by the government consisted of disbursements from Bernard's MEC ac-

count by means of checks made payable to petitioner or MEC and turned over to petitioner by Bernard. These amounts totalled $146,880.77 over the five prosecution years (R. 252-262.) The government also proved that petitioner's bank balance increases and non-deductible expenditures for the prosecution years were far in excess of his reported income and were comparable with the true income as reconstructed by the specific item method (R. 270-282). These funds were applied, as the court below found (Pet. App. 7) "in the acquisition of several real estate parcels and the construction of several residential buildings, * * * boats, automobiles, life insurance, liquor, department store purchases, and a wedding reception."

The gist of the defense was that the funds received by petitioner and his MEC from Bernard did not truly represent income to petitioner, even though he spent the money as he pleased, but were in fact the profits of the overseas distributors which they chose to leave in his care for possible use as advances on future orders of equipment from Vilter (R. 354-356, 371-385, 426).

The only questions raised in the petition relate to the admissibility of evidence. Reference is made (Pet. 4) to a stipulation entered into in connection with a civil suit brought against petitioner by Vilter in 1962, to the effect that Vilter agreed to hold petitioner harmless from any claims of the distributors against petitioner (R. 390). The trial court excluded this on the ground of relevance (R. 392) and on the further ground that it would be meaningless unless the issues and proceedings in the civil suit were con-

sidered in depth by the jury (R. 403). As the court of appeals pointed out (Pet. App. 11) "Such an undertaking would have constituted a significant departure and might well have hopelessly confused the jury."

The other question of admissibility relates to three summaries prepared by the defense accountant, Defendant's Exhibits 127, 128 and 129. Exhibit 127 was a summary of checks paid by Bernard to Vilter and charged by Bernard to the MEC account (R. 497). Exhibit 128 was a summary of transactions in the MEC account on the books of Vilter (R. 503). Since neither of these summaries had anything to do with the items alleged by the government to constitute unreported income (payments by Bernard to petitioner or to his MEC) they were both properly excluded on the ground of relevance (R. 503, 512). Moreover, the gist of these summaries was read to the jury by the accountant who prepared them (R. 497-498, 502-508) and the exclusion of the summaries themselves could not have prejudiced petitioner. Exhibit 129 was a tentative summary of commissions due to foreign distributors, according to a statement by petitioner to the accountant who prepared it (R. 495). Although the accountant testified that the list was "very tentative" (R. 491) he was permitted to testify to the totals shown by the exhibit (R. 495). Since, in extensive testimony before the jury, petitioner had already claimed that the entire $146,880.77 belonged to the overseas distributors, it is hard to see how he could have been harmed by the exclusion of this sum-

mary, which showed only $66,772.40 owing to them (R. 495).[1]

The petition for certiorari should be denied.

Respectfully submitted.

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[1] There is no conflict between this case and *Hanson* v. *United States*, 208 F. 2d 914, 916 (C.A. 6). The only factor there similar to the present case is that a defendant charged with criminal tax evasion asserted that certain funds were not his but were being held in his name for the benefit of another—there a corporation. At issue was the trial court's refusal to admit into evidence the books of the corporation, which allegedly corroborated the defendant's story. Those books, unlike the summaries here, were not prepared solely for use at trial, were not of a "tentative" nature, and were not merely cumulative of other evidence.

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